helped pull the cord while it was around Keller's neck. (TE 200, 247, 256-257, 269, 592-593, 600, 611). Thus, there can be no doubt that at the time the case was submitted to the jury, the co-defendant, Norman Crittenden, was an accomplice, by his own statements, to the murder of Kim Keller.

At the time of the murder, October 18, 1979, Kentucky Rule of Criminal Procedure (RCr) 9.62, supra, was in effect, and therefore, applicable to the case at bar. Kentucky case law was explicit that, absent a directed verdict of acquittal, the trial court was to give to the jury an instruction which embodied the law enunciated in RCr 9.62. Mishler v. Commonwealth, Ky., 556 S.W.2d 676 (1977), Smith v. Commonwealth, Ky., 599 S.W.2d 900, 903 (1980).

Although RCr 9.62 had been repealed on September 1, 1980, it had been in full effect when the crime was committed and when the indictment against the petitioner was returned on November 26, 1979 (App. 13A; TR 2). Nevertheless, the trial court refused to give the jury the petitioner's tendered instruction reflecting RCr 9.62 (TR 260-261; TE 635-639, App. 15).

As noted above, the Kentucky Supreme Court, subsequent to the petitioner's conviction, ruled in Commonwealth v. Brown, supra, (App. 20) that RCr 9.62 was fulling applicable to all cases in which the crime occurred prior to the repeal of the rule but which were tried subsequent to the rule's repeal on September 1, 1980. The Court in Brown reasoned that to rule otherwise would establish an ex post facto law in violation of both the United States and Kentucky Constitutions. Id., 619 S.W.2d at 703 (App. 20).

On direct appeal of the petitioner's conviction, the Kentucky Supreme Court, after acknowledging that Brown "would sustain appellant's contention that he was entitled to an accomplice instruction," Murphy v. Commonwealth, supra, 652 S.W.2d at 72 (App. 4), overruled Commonwealth v. Brown. In doing so, the court reasoned that the abolition of RCr 9.62 was one of procedure rather than of substance and, therefore, did not violate the constitutional prohibition against ex post facto laws. (App. 4-5). The petitioner respectfully submits that by applying the repeal of RCr 9.62 retroactively to the case at bar and by overruling

Commonwealth v. Brown, supra, the Kentucky Supreme Court has decreased the quantum of proof required to have convicted the petitioner at the time of the alleged crime. The result is constitutionally impermissible as it creates an ex post facto law.

As noted in Brown, "It matters not that the retroactive reduction in the quantum of proof results from the exercise of the judicial rulemaking power rather than from an enactment of a legislative body. See Bouie v. City of Columbia, 378 U.S. 347, 353, S.Ct. 1697, 1702, 12 L.Ed.2d 894 (1964)." Commonwealth v. Brown at 703 (App. 20). Thus, the constitutional prohibition against ex post facto laws apply to the case at bar in which a rule of criminal procedure, which was in effect at the time of the alleged crime, was abolished prior to the trial involving that crime. Indeed, judicial action amounting to creation of an ex post facto law is prohibited by the Due Process Clauses of the Fifth and Fourteenth Amendments. Marks v. United States, 430 U.S. 188, 191-192 (1977). "An unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law..." Bouie v. City of Columbia, 378 U.S. at 353. Applying this principle, the Court in Bouie and Rabe v. Washington, 405 U.S. 313 (1972), reversed criminal convictions which rested on an unforeseeable judicial construction of state law. For as this Court noted in Bouie, "If a judicial construction of a statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." Bouie v. City of Columbia, 378 U.S. at 354, citing Hall, General Principles of Criminal Law (2nd Ed. 1960) at 61.[1]

In the case at bar, RCr 9.62 was in effect at the time of the alleged murder on October 18, 1979 (App. 13A). The law at that time not only protected the petitioner from being convicted solely on the

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1. As the Kentucky Supreme Court noted in its opinion herein, Kentucky law has, since 1854, either in statutory or rule form, prohibited a conviction resting solely upon the uncorroborated testimony of an accomplice, Murphy v. Commonwealth, supra, 652 S.W.2d at 72 (App. at 4). Thus, for purposes of whether retroactive application of the repeal of RCr 9.62 violates the constitutional prohibition against ex post facto, it is of no real consequence whether the law is embodied in the form of a rule or statute. This point is consistent with the observation made in Weaver v. Graham, 450 U.S. 24, 31 (1981), that "it is the effect, not the form, of the law that determines whether it is ex post facto." (Emphasis added).

basis of accomplice testimony, but also required the prosecution to present evidence which corroborated the accomplice testimony. With the repeal of RCr 9.62 on September 1, 1980, a defendant in a criminal case could be convicted solely on the testimony of an accomplice. The quantum of proof required to convict the petitioner was substantially reduced with the repeal of RCr 9.62. Fundamental fairness and due process of law clearly require that the petitioner be afforded the safeguards embodied in RCr 9.62 which were in effect at the time of the alleged crime. As of October 18, 1979, the repeal of RCr 9.62 was certainly an unforeseeable and unexpected judicial action which amounted to a substantial change in the law. The petitioner should, therefore, not be deprived of the effect of former RCr 9.62. Moreover, the Kentucky Supreme Court's decision to overrule Commonwealth v. Brown, supra, and thereby deny the petitioner application of RCr 9.62 is equally unforeseeable especially in light of the fact that the question of overruling Brown was never presented by either party in this appeal. Considering these factors as a whole, due process of law requires that the petitioner not lose the benefit of either Commonwealth v. Brown, supra, or former RCr 9.62.

In reaching its conclusion that retroactive application of the abolition of RCr 9.62 did not result in creation of an ex post facto law, the Kentucky Supreme Court in its opinion noted that the common law permitted a conviction based solely on the testimony of an accomplice. The law was, of course, modified by enactment of Section 239 of the 1854 Criminal Code and remained in effect through promulgation of RCr 9.62. Murphy v. Commonwealth, supra, 652 S.W.2d at 72 (App. at 4). As to the 1980 abolition of RCr 9.62, the Kentucky Supreme Court stated, "The change is one of procedure. It does not take less evidence to convict now than before the rule was abolished." (App. 4). Relying on Hopt v. Utah, 110 U.S. 574 (1884), the Kentucky Supreme Court concluded that retroactive application of the repeal of RCr 9.62 did not violate the prohibition against ex post facto laws. Murphy v. Commonwealth, supra, 652 S.W.2d at 72-73 (App. at 4-6). For the reasons that follow, the petitioner respectfully submits that the effect of the Kentucky Supreme Court's action herein is to create an ex post facto law and is, therefore, unconstitutional.

In order to effectuate the purposes underlying the prohibition against ex post facto laws, this Court has held that its "decisions prescribe that two critical elements must be present for a criminal or penal law to be ex post facto, it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." Weaver v. Graham, 450 U.S. at 29. See also Kring v. Missouri, 107 U.S. 221, 228-229 (1883). Other citations omitted. The case at bar meets both prongs of the aforementioned test. First, the crime alleged herein was committed on October 18, 1979. The petitioner was indicted for that crime on November 26, 1979 (App. 13A, TR 2), and RCr 9.62 was repealed on September 1, 1980. By its decision herein, repeal of the rule is made retroactive and applicable to the petitioner. Second, the petitioner is obviously disadvantaged because he can now be convicted solely on the uncorroborated testimony of an accomplice. Moreover, in Calder v. Bull, 3 U.S. 386 (1798), an ex post facto law was defined as a "law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." Id. at 390. See also, Kring v. Missouri, supra, 107 U.S. at 228. In Beazell v. Ohio, 269 U.S. 167, 169-170 (1925), the definition of an ex post facto law was expanded to include any law "which deprives one charged with a crime of any defense available according to law at the time when the act was committed." Applying each of the foregoing definitions to the case at bar, there is no doubt that retroactive application of the repeal of RCr 9.62 constitutes an ex post facto law.

RCr 9.62 required corroborative evidence in addition to the testimony of an accomplice in order to obtain a conviction. With the repeal of the rule, accomplice testimony alone suffices for a conviction. This result leads to the inescapable conclusion that the rule's "abolition enables the Commonwealth to convict on less evidence than previously required." Commonwealth v. Brown, supra, at 703. Beyond that, abolition of the rule likewise strips the accused of a defense based upon the absence of evidence other than that presented through an accomplice. Case law from other jurisdictions supports the petitioner's position.

In Government of Virgin Islands v. Civil, 591 F.2d 255 (3rd Cir. 1979), the legislature had repealed a law identical to RCr 9.62. The Court stated because "the repeal of the corroboration statute reduces the amount of proof necessary for a conviction," Id. at 259, the retroactive application of the statute constituted an ex post facto law. Similarly, in Bowyer v. United States, D.C. App., 422 A.2d 973 (1980), the Court considered a situation where a decision ending the requirement that a prosecuting witness' testimony had to be corroborated, was applied to a crime which had taken place prior to the decision. The court reversed the conviction because the trial court refused to give the corroboration instruction. In language appropriate for the case at bar, the Court observed that its decision "altered the legal rules of evidence to require less testimony than that required at the time of the alleged rape, in order to convict. Thus, the retroactive application of that rule to an offense appellant was charged to have committed one year earlier, did precisely what the Constitution proscribes." Id. at 981. See also United States v. Williams, 475 F.2d 355 (D.C. Cir. 1973), United States v. Henson, 486 F.2d 1292 (D.C. Cir. 1973), and State v. Beyers, 627 P.2d 788, 796 (Idaho, 1981). The same conclusion is warranted in the case at bar.

One other aspect of the issue remains to be considered. As noted above, the Kentucky Supreme Court relied upon Hopt v. Utah, supra, in reaching its conclusion and ruling in essence that retroactive application of the repeal of RCr 9.62 is procedural in nature rather than substantive. Based upon this analysis, the Kentucky Supreme Court has concluded that the result herein does not violate the prohibitions against ex post facto laws. Murphy v. Commonwealth, supra, 652 S.W.2d at 72-73. The petitioner respectfully submits that the Kentucky Supreme Court's reliance on Hopt is misplaced.

As noted in the dissenting opinion, Hopt is readily distinguishable from the case at bar. Murphy v. Commonwealth, supra, 652 S.W.2d 75-77). (Leibson, J., dissenting) (App. 7-9). Although no ex post facto violation occurs from procedural changes which do "not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt"[2]; the clear implication in Hopt is that "procedural changes which lessen the quantity

2. Hopt v. Utah, supra, 110 U.S. at 590.

or degree of proof necessary to establish guilt are in conflict with the ex post facto clause." Murphy v. Commonwealth, supra, 652 S.W.2d at 76. (Leibson, J., dissenting, App. 8). This conclusion is supported by the ruling in Hopt that "Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not ex post facto in their application to prosecutions for crimes committed prior to their passage; for they do not...alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction where the crime was committed." Id., 110 U.S. at 589. Here, the Kentucky Supreme Court found no ex post facto violation by concluding that, "The rule change was simply a procedure change which made a certain class of witnesses competent without corroboration." Murphy v. Commonwealth, supra, 652 S.W.2d at 73 (App. 5). The petitioner respectfully submits that the issue here is not one of an accomplice's competency to testify as a witness. Rather, the issue is whether the abolition of the requirement that accomplice testimony be corroborated reduces the amount of proof needed to obtain a criminal conviction. That question must obviously be answered in the affirmative. See, State v. Beyers, supra, 627 P.2d at 796.

Moreover, the essence of former RCr 9.62 does not deal with the "competency" of an accomplice to give testimony as a witness as did this Court's decision in Hopt v. Utah, supra. A competent witness is defined as "One who is legally qualified to be heard to testify in a cause." (Black's Law Dictionary, p. 257, 5th Ed. 1979). RCr 9.62 put no restriction on an accomplice's ability to give testimony. Instead, the rule enunciated the degree of proof necessary to obtain a criminal conviction in a case involving the use of accomplice testimony as evidence. Accordingly, it is plainly erroneous to characterize RCr 9.62 as merely a procedural rule dealing with the competency of accomplice to give testimony in a criminal trial. Former RCr 9.62 was substantive in nature and, therefore, retroactive application of its repeal violates the constitutional prohibitions against ex post facto laws.

When the evidence introduced against the petitioner, aside from the accomplice testimony of the co-defendant, is examined, it is clear that there was insufficient corroboration tending to connect the petitioner with the commission of the crime. The Kentucky Supreme Court recognized that, under RCr 9.62, the trial court had an obligation to give the tendered instruction reflecting RCr 9.62. Murphy v. Commonwealth, supra, 652 S.W.2d at 72 (App. at 4). The retroactive application of the repeal of RCr 9.62, thus, had the effect of an ex post facto law, and deprived the petitioner of his liberty without due process of law. Accordingly, this Court should grant the petition for a writ of certiorari.

II. THE TRIAL COURT'S FAILURE TO DELETE THE PETITIONER'S NAME FROM AN INCRIMINATING STATEMENT GIVEN BY THE CO-DEFENDANT SUBSTANTIALLY PREJUDICED THE PETITIONER'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Prior to trial, defense counsel moved that any reference to the petitioner by the co-defendant, Crittenden, in his statements be deleted (TE 62). The motion was overruled (TE 62). The motion was renewed during the testimony of Detective Sherrard who obtained a tape recorded statement from Crittenden on September 3, 1980 (TE 195-198) and again was overruled (TE 198). The tape recording was played without deleting the name of the petitioner (TE 206). The jury was admonished by the court and defense counsel moved for a mistrial (TE 206-207). The motion was overruled (TE 207). Defense counsel also objected to the introduction of Crittenden's written statement of October 30, 1979, and the motions were overruled (TE 251-253, 483-484, 505). At the close of the case for the Commonwealth and the case for the defense, the court overruled the petitioner's renewed motions for a mistrial for failure to excise the petitioner's name from the co-defendant's statements (TE 300, 634-635).

Case law clearly required the trial court to have excised the petitioner's name from Crittenden's statements when they were

presented to the jury. Bruton v. United States, 391 U.S. 12 (1968). Although Crittenden eventually testified in his own behalf and admitted making the statement (TE 479-782), the effect of the trial court's ruling not to delete reference to the petitioner in Crittenden's statements was to force the petitioner to yield his constitutional right to remain silent and not to testify. The trial court's ruling put the petitioner in the untenable position of having to testify in order to rebut Crittenden's statements and present a defense in his own behalf. Thus, the petitioner was left with no choice but to give up his right to remain silent and testify in his own behalf. The petitioner should not be put in the position of having to choose which constitutional right he wishes to assert. It is manifestly unfair to force a defendant to surrender one constitutional right in order to exercise or protect another right. Simmons v. United States, 390 U.S. 377 (1968).

In addressing this issue, the Kentucky Supreme Court held that the error, if any, would be harmless due to the fact that the co-defendant did eventually testify after the petitioner testified. Murphy v. Commonwealth, supra, 652 S.W.2d at 71 (App. at 3). In his dissenting opinion, Justice Leibson pointed out that the error could not be harmless beyond a reasonable doubt because the effect of admitting the statements was to force the petitioner to testify, because of the order of proof at trial, before the co-defendant. Murphy v. Commonwealth, supra, 652 S.W.2d at 76. (Dissenting opinion of Justice Leibson, App. at 8). Therefore, the petitioner was forced to make the decision whether to testify based on the incriminating statements of the co-defendant without knowing whether the co-defendant would testify. In addition, as Justice Leibson pointed out in his dissent, the statements which implicated the petitioner by name were, at least in part, contradictory with the subsequent testimony of the co-defendant. Id., 652 S.W.2d at 76. (Dissenting opinion of Justice Leibson, App. at 8).

In short, the trial court's violation of the rule requiring the deletion of the defendant's name from the incriminating statements of the co-defendant, Bruton v. United States, 391 U.S. 12 (1968), placed the petitioner in exactly the type of untenable position that Bruton, supra, was intended to prevent.

CONCLUSION

For the foregoing reasons, the petitioner, Gregory Arnold Murphy, prays that this Court grant his petition for a writ of certiorari and review the decision of the court below.

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IN THE

SUPREME COURT OF THE UNITED STATES

NO._____, Misc., October Term, 1983

GREGORY ARNOLD MURPHY,	)
	)
Petitioner	)
	)
VS.	)
	)
COMMONWEALTH OF KENTUCKY,	)
	)
Respondent.	)

INDEX TO THE APPENDIX

Gregory Arnold MURPHY, Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

and

Gregory Arnold MURPHY, Movant/Appellant,

v.

COMMONWEALTH of Kentucky, Respondent/Appellee.

Supreme Court of Kentucky.

May 11, 1983.

Rehearing Denied July 6, 1983.

Defendant was convicted in the Circuit Court, Jefferson County, Joseph H. Eckert, J., of murder, and he appealed. During pendency of appeal he filed motion for new trial based upon allegedly newly discovered evidence. Request for hearing upon that motion was overruled and defendant also appealed from that order. The Supreme Court, Vance, J., held that: (1) any error in admitting codefendant's written statement and tape recording incriminating defendant was harmless, where codefendant subsequently took the stand and gave testimony repetitive of matter in statement and recording; (2) refusal to apply in defendant's case rule requiring corroboration of accomplice's testimony did not constitute ex post facto law, in view of fact that elements of offense were not changed by repeal of rule and proof thereof remained the same; (3) evidence was sufficient to sustain conviction; (4) trial court did not error in admitting statements allegedly obtained in violation of *Miranda* for purposes of rebuttal to contradict testimony offered by defendant; (5) admission of evidence of prior conviction for possession of heroin was not prejudicially erroneous, in that it established possible motive for murder; (6) foundation was sufficiently laid for introduction of codefendant's tape recording incriminating defendant; and (7) order overruling defendant's motion to set hearing at which defendant could present evidence in support of his motion for new trial was interlocutory and not appealable.

Affirmed in part; dismissed in part.

Leibson, J., dissented and filed opinion.

1. Criminal Law ⇐1169.7

Any error in admitting codefendant's written statement and tape recording incriminating defendant was harmless, where codefendant subsequently took the stand and gave testimony repetitive of matter in statement and recording; any compulsion felt by defendant to take the stand to rebut incriminating matter was result of defendant's own failure to object to being first of codefendants to testify. U.S.C.A. Const. Amend. 5.

2. Criminal Law ⇐510

At common law, conviction could be had solely on testimony of accomplice without corroboration. Rules Crim.Proc., Rule 9.62 (Repealed).

3. Constitutional Law ⇐199

Though defendant allegedly committed offense prior to repeal of rule requiring corroboration of accomplice testimony, but trial thereon did not occur until after repeal of rule, refusal to apply rule in defendant's case would not constitute ex post facto law, in view of fact that elements of offense were not changed by repeal of rule and proof thereof remained the same; rule change was one merely of procedure, making certain classes of witnesses competent without corroboration; overruling *Commonwealth v. Brown*, 619 S.W.2d 699. U.S.C.A. Const. Art. 1, § 10, cl. 1.

4. Homicide ⇐250

Evidence that defendant and codefendant were looking for victim shortly before murder, that defendant was then in possession of cord which fit description of murder weapon, and that defendant had been heard to agree with codefendant to kill victim, was, together with codefendant's testimony, sufficient to sustain murder conviction.

5. Criminal Law ⇐412.2(3), 683(1)

Statements obtained in violation of *Miranda* are not admissible in chief for prosecution, but they may be introduced in rebuttal to contradict testimony offered by defendant. U.S.C.A. Const.Amend. 5.

6. Criminal Law ⇐370, 371(1, 12)

Prior convictions are admissible to show motive, guilty knowledge, and intent.

7. Criminal Law ⇐1169.11

Evidence of prior conviction for possession of heroin was not prejudicially erroneous, in view of other evidence linking narcotics as possible motive for murder.

8. Criminal Law ⇐472, 1169.9

Testimony of pathologist concerning hair samples taken from murder victim's clothing was neither prejudicial nor erroneously admitted, in view of fact that defendant's own counsel was first to examine pathologist about report in question and pathologist's testimony made it plain that results of the tests did not in any way link defendant to murder.

9. Criminal Law ⇐444

Foundation for admission of codefendant's incriminating tape recording was sufficiently laid by fact that officer present when tape recording was made testified in court that he caused transcript of tape to be made, that he listened to tape before it was played in court, that it had not been altered, and that language on tape played before jury coincided with transcription and with his memory of what was said at time of taking.

10. Criminal Law ⇐1023(13)

Order denying motion to set hearing at which defendant could present evidence in support of motion for new trial on basis of allegedly newly discovered evidence was interlocutory and was not appealable.

Frank W. Heft, Jr., Chief Appellate, Jefferson Dist. Public Defender, Louisville, for appellant.

Steven L. Beshear, Atty. Gen., Eileen Walsh, Asst. Atty. Gen., Frankfort, for appellee.

VANCE, Justice.

Gregory Arnold Murphy appeals as a matter of right from his conviction of murder for which he was sentenced to life imprisonment. During the pendancy of the appeal, he filed a motion for a new trial based upon the alleged discovery of new evidence. A request for a hearing upon this motion was overruled, and his appeal from that order was transferred to this court. The two appeals have been heard together, and each will be considered in this opinion.

The appellant Murphy and Norman Crittenden were indicted separately for the murder of Kim Keller who was found dead from strangulation in an alley in Louisville, Kentucky, on October 18, 1979. They were tried jointly. Murphy was convicted, and the jury was unable to agree upon a verdict as to Crittenden.

Crittenden gave a statement to the police on October 30, 1979, which was reduced to writing and signed by Crittenden in which he admitted he had seen the murder but claimed that he was a witness only, not a participant. This written statement was admitted in evidence on motion by Crittenden's counsel over objection by Murphy.

In the statement Crittenden asserted that he had been with Murphy practically the entire day on October 17, 1979, and into the morning of October 18. On the evening of October 17, Crittenden, using his automobile, drove Murphy to a number of bars, liquor stores, and night spots. At approximately 1:00 a.m., October 18, they saw the deceased at Jack's Grill, and she later joined them in the car. An argument developed between Murphy and the deceased and Crittenden, at the direction of Murphy, stopped the car, and Murphy and the deceased got out. Murphy hit the deceased in the face, and Crittenden claimed he tried to stop him but that Murphy knocked him down, and he got back in the car. Murphy then pulled something around the deceased's neck, and

after about 5 or 10 minutes Murphy got back in the car and they drove away leaving the deceased in the alley.

On September 3, 1980, Crittenden gave another statement to police officers which was tape recorded. Again he placed the responsibility for the killing on Murphy but admitted that he held the deceased's arms and legs while Murphy strangled her with a short cord. He denied that he helped pull the cord around her throat.

In the tape recording he also stated that earlier in the evening of October 17, 1979, he and Murphy had stopped to see a girl named Susan, a prostitute, and that Murphy had asked her to go with them, but she refused.

The tape recording was played before the jury over Murphy's objection.

Reinella Susan Coates testified that Murphy and Crittenden came by the hotel in which she lived and propositioned her for a date on October 17, 1979; that both were drinking heavily; that Murphy was playing with a short white cord; that they solicited her to accompany them but she refused; and that they asked her where they could find the deceased, Kim Keller. She said that less than two weeks before the 17th she had been at Murphy's house with Crittenden; that both were drinking and smoking pot; that Crittenden had said he was going to kill the deceased for ripping him off; that he was going to strangle her and beat her to death; that he asked Murphy to help him and that Murphy agreed.

[1] Appellant sets forth ten allegations of error in his original appeal. He first contends that the tape recording and the signed statement of the codefendant Crittenden were improperly admitted in evidence because the tape and the statement incriminated him, and he had no opportunity to confront his accuser or to cross-examine him. He relies upon *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

It is true that the tape recording and statement were admitted during the Commonwealth's case-in-chief and before it was known whether Crittenden would testify. Thus, at the time of admission appellant had no opportunity to cross-examine his codefendant concerning the allegations that incriminated appellant.

Later in the trial, Crittenden took the stand in his own defense. His testimony at trial was a repetition of the incriminatory statements he had made against appellant in the written statement and in the tape recording. Appellant's counsel cross-examined Crittenden extensively about his incrimination of appellant.

Assuming for purposes of argument, but not deciding, that no portion of Crittenden's statement or tape recording which incriminated appellant should have been heard by the jury at the time it was heard, the fact remains that Crittenden later testified to the same matters and was cross-examined about them. It would appear that his subsequent testimony and cross-examination would render harmless any error concerning incrimination by a codefendant. See *Ferguson v. Commonwealth*, Ky., 512 S.W.2d 501 (1974).

Murphy's only real claim of prejudice is that by reason of the erroneous admission of the tape recording and the Crittenden statement, he was forced to take the stand and deny the statements of his codefendant, and thus he was required to give up his constitutional right to remain silent.

The difficulty with this position is that he made no objection of this nature to the trial court. Had he made such an objection, Crittenden could have been given the opportunity to testify first. If Crittenden had been the first of the two defendants to testify, his direct testimony would have confronted appellant with the same need to testify in his own behalf. There was no requirement that Murphy be the first of the defendants to testify and Murphy, by failing to raise this issue with the trial court, precipitated the problem of which he now complains.

Appellant next contends that the trial court erred in refusing to give his tendered accomplice instruction.

This crime was committed October 18, 1979. RCr 9.62 which required corroboration of the testimony of an accomplice was abolished October 1, 1980. This trial occurred in February, 1981. In July, 1981, *Commonwealth v. Brown*, Ky., 619 S.W.2d 699 (1981), was decided in which this court held that RCr 9.62, would be applicable to crimes committed before its abolition but tried thereafter.

Appellant did not have the benefit of *Brown* at the time of his trial, nor rely upon it, yet its holding would sustain appellant's contention that he was entitled to an accomplice instruction.

We have decided to reexamine our holding in *Commonwealth v. Brown, supra*. *Brown* reasoned that a conviction could be had upon less evidence after the abolition of RCr 9.62 than before, and therefore the abolition of RCr 9.62 was ex post facto when applied to crimes committed before the rule was abolished but tried after the abolition.

[2] At common law a conviction could be had solely on the testimony of an accomplice without corroboration. *Blackburn v. Commonwealth*, 12 Bush 181 (1876); *Commonwealth v. Barton*, 153 Ky., 465, 156 S.W. 113 (1913); Roberson, *New Kentucky Criminal Law and Procedure*, 2nd Edition, Testimony of Accomplices, sections 1828 and 1829.

[3] It was decided in the case of James Atwood and Thomas Robbins, summer assizes, at Bridgewater, County of Somerset, England (1788)[1] that the testimony of an accomplice was competent and would sustain a conviction without corroboration. It was pointed out that the problem with the testimony of an accomplice was not competency but credibility. The credibility of an accomplice is suspect because he is an admitted criminal and also because his testimony may be influenced by the hope of advantageous treatment of his case.

Kentucky followed the common law and permitted a conviction on the uncorroborated testimony of an accomplice until the adoption of section 239 of the criminal code in 1854 which prohibited a conviction solely upon uncorroborated testimony of an accomplice. This code provision was carried intact into subsequent criminal codes and into RCr 9.62.

The effect of the code provisions and RCr 9.62 was that testimony, otherwise competent, was deemed to be incredible as a matter of law unless corroborated in some degree. With the abolition of RCr 9.62 we have returned to the procedure as it existed at common law.

The change is one of procedure. It does not take less evidence to convict now than before the rule was abolished. The same facts must be established to prove murder or manslaughter now as before. The only change effected by the abolition of RCr 9.62 is that an impediment to the credibility of certain witnesses has been removed.

In *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884), the Supreme Court held that a statute which removed the ineligibility of felons as witnesses was applicable in the trial of crimes committed before the passage of the statute. Thus, a conviction was upheld based upon the use of testimony which could not have been used when the crime was committed. The court held that the statute simply enlarged the class of persons competent to testify and was procedural.

> Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offence was committed, might in respect of that offence, be obnoxious to the constitutional inhibition upon ex post *facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the

1. Reported in 2 H. Toulmin and J. Blair, *A Review of the Criminal Law of the Commonwealth of Kentucky*, 403-405 (1806).

crime and the amount or degree of proof essential to conviction—only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offence charged. 110 U.S. at 590, 4 S.Ct. at 210.

The elements of the offense of which appellant was convicted have not been changed. It takes the same proof to establish those elements now as it did before the abolition of RCr 9.62. Those elements were established by the testimony of the accomplice. The rule change was simply a procedure change which made a certain class of witnesses competent without corroboration. *Commonwealth v. Brown, supra*, is overruled, and there was no error in the failure of the trial court to give an accomplice instruction.

[4] Appellant's contention that he was entitled to a directed verdict of not guilty is without merit. The testimony of Crittenden, standing alone, is sufficient to sustain the conviction. In addition to Crittenden, there was testimony of Reinella Coates that appellant and Crittenden were looking for the deceased a few hours before the murder; that appellant was twiddling a cord which fit the description of the murder weapon; and that a few days before the deceased was actually beaten and strangled she had heard appellant agree to help Crittenden kill the deceased by beating and strangling her.

[5] Appellant next complains that an Assistant Commonwealth Attorney who had handled the initial phases of this case, but was not assigned to the trial, was permitted to testify that appellant, while waiting for his attorney to appear for a pretrial conference, volunteered details of his activity the night of October 17, 1979, including the fact that he had been with Crittenden and the deceased until approximately 10:30 p.m. on that night. This was used to rebut the trial testimony of appellant that he had not seen the deceased since October 9th.

The record is not clear as to whether this testimony was heard by the jury or was put into the record as an avowal. Counsel for appellant had objected to any statement made by appellant to an Assistant Commonwealth Attorney outside the presence of his own counsel. The court held a hearing on the objection and ruled that the testimony could not be admitted. The prosecuting attorney stated the substance of the testimony the witness would give if permitted to answer. The trial judge asked the witness if he would so testify, and the witness responded affirmatively.

The prosecuting attorney then posed the question to the witness and he responded. Nothing in the record indicates that the question and the response were not a part of the hearing conducted outside the presence of the jury. It appears to be an avowal placed in the record by a question to and an answer by the witness. This conclusion is bolstered by the fact that no objection is shown to the question. The court had just ruled that the witness could not be questioned on the matter. We consider it unlikely that the defense would sit mute and allow the matter to go before the jury.

In any event, there was no error even if the testimony was heard by the jury. It was offered to contradict the appellant's testimony in chief. Statements obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), are not admissible in chief for the prosecution, but they may be introduced in rebuttal to contradict the testimony offered by the defendant.

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.... Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing de-

vices of the adversary process. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment....

The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.... *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971).

In *Walder v. United States*, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954), physical evidence, inadmissible in chief, was permitted to be used for impeachment purposes.

It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* [232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652] doctrine would be a perversion of the Fourth Amendment.

[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility. 347 U.S. at 65, 74 S.Ct. at 356.

During cross-examination of appellant by counsel for the codefendant, Crittenden, appellant was asked about and admitted a prior conviction for possession of heroin. This was admitted, not for impeachment, but ostensibly to show motive in view of the testimony that appellant killed the deceased because she had withheld from appellant his share of the proceeds from the sale of narcotics.

[6, 7] The vice in permitting testimony as to prior convictions is that jurors may tend to convict because of the criminal record of the accused rather than the evidence presented as to guilt. But prior convictions are admissible to show motive, guilty knowledge and intent, and we feel that the evidence of the prior conviction was not prejudicially erroneous in view of the evidence which linked narcotics as a possible motive for the murder.

[8] Appellant contends that testimony of a pathologist concerning certain hair samples taken from the victim's clothing was prejudicial and was erroneously admitted because the pathologist testified to results of laboratory tests which were performed by others not under his supervision. In the first place, appellant's counsel on cross-examination was the first to examine the pathologist about the report. In the second place the pathologist's testimony made it plain that the results of the laboratory tests, according to the report, did not in any way link appellant to the crime. We think the testimony was not erroneously admitted and was not, in fact, adverse to appellant.

[9] Appellant further contends the tape recording of Crittenden's statement was not admissible because the proper foundation was not laid. Specifically, he contends that the authenticity and correctness of the recording was not established, there was no showing that alterations had not been made, and no showing of the preservation of the tape.

It is enough to point out that the officer present when the tape recording was made testified in court that he caused a transcript of the tape to be made—that he listened to the tape before it was played in court—that it had not been altered—that the language on the tape played before the jury coincided with the transcription and with his memory of what was said at the time of taking. We think this sufficient to establish the correctness and preservation of the tape, and that it had not been altered.

We find no merit worthy of discussion in appellant's contention that a juror who told the trial court he could not impose the minimum penalty allowed for this crime was improperly dismissed from the panel; that testimony of Crittenden that he took a polygraph test was improper and prejudicial

and that testimony of Reinella Coates expressed a conclusion on her part that the two defendants were, in her presence, conspiring to kill the deceased. The matter was put in proper perspective when Reinella Coates testified that appellant did not say he was going to strangle her, but she did hear appellant and Crittenden discussing the strangulation of the deceased "who is now dead from strangulation and beaten."

[10] Appellant's counsel filed an unverified motion for new trial which alleged that counsel had learned that one Ralph Willock saw Kim Keller and Richard Harrison at Jack's Grill on the night of her death, that they were arguing about money owed by Keller to Harrison from a "drug deal" and that they left together. The motion was not accompanied by any affidavit of Ralph Willock; it did not establish that due diligence was used to discover the alleged new evidence before trial, and the motion did not show in any way that a new trial would result in a different verdict.

The motion did request a hearing be set at which appellant could present evidence in support of the motion for new trial. The motion to set a hearing was overruled, but nothing in the record indicates that any order has been entered disposing of the motion for new trial. The order overruling the motion to set a hearing is an interlocutory order and is not appealable.

The Judgment of the Jefferson Circuit Court in 81-SC-572-MR is affirmed. The appeal in 82-SC-285-TG is dismissed.

STEPHENS, C.J., and AKER, GANT, STEPHENSON, VANCE, and WINTERSHEIMER, JJ., concur.

LEIBSON, J., dissents.

LEIBSON, Justice, dissenting.

I respectfully dissent. This case contains at least two errors so prejudicial as to warrant reversal.

First, the trial court erred in refusing to give the appellant's tendered accomplice instruction. The instruction properly characterized the codefendant, Crittenden, as an accomplice as a matter of law and set forth the mandate of former RCr 9.62 that the conviction cannot be based on the uncorroborated testimony of an accomplice. To convict the jury must believe there was additional evidence tending to connect the defendant to the crime. The majority opinion acknowledges that appellant was entitled to an instruction under *Commonwealth v. Brown*, Ky., 619 S.W.2d 699 (1981), but overrules that case. I believe that the reasoning in *Brown* is sound and disagree that it should be overruled. Further, I believe that the accomplice rule has merit. This case is a prime example of a person convicted almost entirely on the testimony of an accomplice who gave prior inconsistent statements and whose motives for testifying are highly suspect.

In *Commonwealth v. Brown, supra*, this court held that retroactive abolition of RCr 9.62 is ex post facto when applied to persons allegedly committing crimes while the accomplice rule was still in effect. The court noted that the rule's abrogation enables the Commonwealth to convict on less evidence than previously required and concluded that "allowing the Commonwealth to proceed with this advantage would violate Section 19 of our Constitution and Article 1, Section 10 of the Constitution of the United States, both of which forbid ex post facto laws." *Id.* at 703.

The holding in *Brown* is supported by a long line of cases beginning with *Calder v. Bull*, 3 U.S. 386, 3 Dall. 386, 1 L.Ed. 648 (1798). *Calder* holds at page 390:

> "An ex post facto law, within the meaning of the U.S. Constitution, is one which ... alters the legal rules of evidence, and receives less, or different testimony, than the law required at the commission of the offense, in order to convict the offender."

The United States Supreme Court has long recognized that certain procedural changes can fall within the prohibition of the ex post facto clause. In *Kring v. Missouri*, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506

(1882), the court stated at page 226, 2 S.Ct. at 450–51:

> "(A)ny law passed after the commission of an offense which ... (i)n relation to that offense, or its consequences, alters the situation of a party to his disadvantage, ... is an ex post facto law .... No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time."

The United States Supreme Court has made it clear that judicial decisions, like legislative enactments, are ex post facto if applied retroactively to change either the quantum or kind of proof necessary to show guilt. See *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964).

The majority opinion cites *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884), in support of its conclusion that the abolition of RCr 9.62 is a procedural change which does not alter the amount of proof necessary to convict. But a close reading of *Hopt* reveals that the court distinguished between laws which merely change evidentiary rules and those which change necessary proof. The court said at page 589, 4 S.Ct. at 210:

> "Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not ex post facto .... *(T)hey do not ... alter the degree, or lessen the amount or measure of proof* which was made necessary to conviction when the crime was committed." (emphasis added).

Thus, the court actually reaffirmed its earlier holding that procedural changes which lessen the quantity or degree of proof necessary to establish guilt are in conflict with the ex post facto clause.

Clearly, appellant's conviction in the present case is based on less evidence than was required by former RCr 9.62. A conviction based solely on the *uncorroborated* testimony of an accomplice is, by definition, a conviction based on less evidence than one based on accomplice testimony plus corroboration. The additional evidence is the independent evidence which tends to connect the accused to the commission of the crime. Additional evidence is required to prevent one from being convicted solely on his being "fingered" by another participant, because accusations by participants against each other tend to be unreliable. *Taylor v. Commonwealth*, Ky., 461 S.W.2d 920, (1970), *cert. denied*, 404 U.S. 837, 92 S.Ct. 126, 30 L.Ed.2d 70 (1971).

Because I believe that the reasons for the corroboration requirement of RCr 9.62 are as valid now as they ever were, I would not hasten the rule's demise by applying its abolition retroactively. More importantly, I believe that constitutional principles require the prospective application approved in *Commonwealth v. Brown, supra*.

The second error by the trial court is its failure to strike incriminating references to the appellant in the statements of the codefendant Crittenden. These statements were improperly admitted against appellant under the United States Supreme Court decision in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The majority concludes that this was harmless error because Crittenden later testified consistently with his previously admitted statements. Crittenden's testimony certainly was not consistent with *both* of his prior statements because they were in part contradictory. Moreover, the effect of admitting the statements was to force appellant to testify in violation of his constitutional right to remain silent. The order of proof at trial required appellant to go forward before his codefendant Crittenden. Appellant was placed in the untenable position of having to testify in order to rebut Crittenden's statements and present a defense in his own behalf. I do not agree with the majority opinion that appellant precipitated this error by failing to demand a change in the order of proof. This position is more innovative than realistic. It is manifestly unfair to force appellant to surrender one constitutional right in order to protect another. *Simmons v. United*

States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).

KENTUCKY BAR ASSOCIATION, Complainant,

v.

Wayne W. FITZGERALD, Respondent.

Supreme Court of Kentucky.

June 15, 1983.

On review of the findings, conclusions and recommendations of the Bar Association, the Supreme Court, Stephens, C.J., held that violation of disciplinary rule providing that lawyer shall not accept private employment in matter upon merits of which he has acted in judicial capacity warrants public reprimand in view of previous private reprimand.

Public reprimand ordered.

Aker, J., dissented.

Attorney and Client ⇐58

Violation of disciplinary rule providing that lawyer shall not accept private employment in matter upon merits of which he has acted in judicial capacity warrants public reprimand in view of previous private reprimand. ABA Code of Prof.Resp., DR9–101(A); Sup.Ct.Rules, Rule 3.130.

Bruce K. Davis, Director, Michael M. Hooper, Asst. Director, Kentucky Bar Ass'n, Frankfort, for complainant.

Wayne W. Fitzgerald, Cynthiana, pro se.

OPINION AND ORDER

Pursuant to the authority of SCR 3.370(7), this Court has reviewed the findings, conclusions and recommendations of the Kentucky Bar Association and the entire record made in this case. Such review discloses that respondent is guilty as charged of unprofessional conduct tending to bring the bench and bar into disrepute. A public reprimand is warranted by the evidence.

On February 15, 1979, acting in his capacity as Judge of Pendleton District Court, respondent entered an order transferring custody of three minor children from their natural mother to an uncle. After his defeat in a subsequent election, respondent stepped down as District Judge and returned to the private practice of law. On March 25, 1982, the natural mother filed a motion in Pendleton District Court to modify the previous custody order and regain custody of the children. Respondent afforded legal representation to the uncle in connection with this motion in violation of Disciplinary Rule 9–101(A) of the American Bar Association's *Model Code of Professional Responsibility* which provides that:

> "A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity."

Ethical Consideration 9–3 of the ABA's *Model Code* explains that a lawyer should avoid professional involvement in matters for which he has previously exercised substantial judicial responsibility "since to accept employment would give the appearance of impropriety even if none exists."

The ethical principles embodied in the ABA's *Model Code* are made applicable to lawyers in this state by virtue of SCR 3.130.

We note that the Board of Governors of the Kentucky Bar Association found respondent guilty of unprofessional conduct in these circumstances and recommended a private reprimand. In view of the fact that respondent has once previously been so reprimanded and considering the gravity of the present charge, we deem a public reprimand, pursuant to SCR 3.380, to be a more appropriate sanction.

Respondent is hereby publicly reprimanded and ordered to pay the costs of this proceeding.

JOHN C. SCOTT
CLERK

ROOM 209
(502) 564-4720

Office of the Clerk
SUPREME COURT OF KENTUCKY
State Capital Frankfort, 40601

RECEIPT NOTICE

TO: Frank W. Heft, Jr.

FROM: John C. Scott, Clerk, Supreme Court of Kentucky

DATE: May 26, 1983

RE: Gregory Arnold Murphy vs Commonwealth of Kentucky
File #81-SC-572-MR

The document listed below has been received and filed in this office today in the above-styled case:*

Appellant filed notice and petition for rehearing

cc: Eileen Walsh
file

*NOTE: RESPONSE TIME TO MOTIONS BEGINS WITH THE SERVICE DATE(CR 76.34[2]
RESPONSE TIME FOR BRIEFS BEGINS WITH THE FILING DATE (CR 76.12)

Form SCC-7

Supreme Court of Kentucky

81-SC-572-MR

GREGORY ARNOLD MURPHY — APPELLANT

V. JEFFERSON CIRCUIT COURT
#79-CR-1390

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING

The appellant's petition for rehearing is denied.

Stephen, C.J., and Aker, Gant, Stephenson, Vance and Wintersheimer, JJ., concur; Leibson, J., does not concur.

Entered July 6, 1983.

Robert F. Stephens
Chief Justice

JEFFERSON CIRCUIT COURT

COMMONWEALTH OF KENTUCKY	PLAINTIFF)	FIRST DIVISION
	)	INDICTMENT NO. 79CR1390
	)	CHARGE: MURDER
	)	FINAL JUDGMENT
GREGORY ARNOLD MURPHY	DEFENDANT)	SENTENCE OF IMPRISONMENT

* * * * * * * * * * * * * *

The defendant having entered a plea of not guilty and on the 10th day of FEBRUARY, 1981, a jury having returned a verdict that the defendant was guilty of the crime of MURDER and fixed his sentence at LIFE;

On this 2nd day of April, 1981, the defendant, GREGORY ARNOLD MURPHY, appeared in open Court with his attorney, Honorable FRANK W. HEFT, JR., and the Court inquired of the defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded the defendant and his counsel an opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment. The Court having provided the defendant through his counsel with a copy of the written report of the presentence investigation prepared by the Division of Probation and Parole, and the Court having given due consideration to said written report of the presentence investigation prepared by the Division of Probation and Parole, and to the nature and circumstances of the crime, and to the history, character and condition of the defendant, the Court is of the opinion that imprisonment is necessary for the protection of the public because:

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(a) there is a substantial risk that defendant will commit another crime during any period of probation or conditional discharge.

(b) the defendant is in the need of correctional treatment that can be provided most effectively by the defendant's commitment to a correctional institute.

(c) probation or conditional discharge would unduly depreciate the seriousness of the defendant's crime.

(d) due to the defendant's record in part.

(e) due to the violent nature of the defendant's crime.

(f) due to the dangerous nature of the defendant's crime.

(g) due to deliberate nature of the defendant's crime.

No sufficient cause having been shown why sentence of imprisonment should not be pronounced, sentence is imposed by the Court upon the defendant, and it is therefore ORDERED AND ADJUDGED BY THE COURT that the defendant is guilty of the crime of MURDER and his sentence is fixed at a maximum term of LIFE imprisonment in the State Penitentiary at hard labor;

and

IT IS FURTHER ORDERED that the Sheriff of Jefferson County [illegible] Corrections hereunder at such location within this state as the Department shall designate.

IT IS FURTEER ORDERED that the defendant is hereby credited with time spent in custody prior to the commencement of sentence; namely, 54 days, toward service of the maximum term of imprisonment.

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After imposing sentence, the Court informed the defendant that he has a right to appeal to the Supreme Court of Kentucky with the assistance of counsel; that if he were financially unable to afford an appeal, a record would be prepared for him at public expense and counsel would be appointed to represent him; that an appeal must be timely made within ten days of the date of this judgment, and that the Clerk of the Court would prepare and file a notice of appeal in his behalf within that time if he so requests. Pending appeal the defendant is remanded to the Corrections Department.

Joseph H. Eckert
JOSEPH H. ECKERT, JUDGE

April 2, 1981
DATE

NOTICE:

The foregoing Judgment was entered on the 2nd day of April 1981.

BY: Sue Chandler D.C.

The foregoing Judgment and notice of entry was served upon the defendant by mailing a true copy to Hon. Frank W. Heft, Jr. attorney of record, postage pre-paid, this 3rd day of April. 1981.

BY: Sue Chandler D.C.

ENTERED IN COURT

APR 2 - 1981

PAULIE MILLER, Clerk

By... D.C.

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THE COMMONWEALTH OF KENTUCKY

Jefferson Circuit Court, Criminal Division

79CR1390 (2)

NOVEMBER Term A. D., 19 79

THE COMMONWEALTH OF KENTUCKY

Against

GREGORY ARNOLD MURPHY

MURDER
KRS 507.020 (Capital Offense)
(Death or 20 years to Life

The Grand Jurors of the County of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, charge:

COUNT ONE

That on or about the 18th day of October, 1979, in Jefferson County, Kentucky, the above named defendant committed the (capital) offense of murder by intentionally causing the death of Kimberly Keller by strangulation.

AGAINST THE PEACE AND DIGNITY OF THE COMMONWEALTH OF KENTUCKY.

A TRUE BILL

[signature]
Foreman

WIT: Martha Reed, 1246 S. 2nd St., Apt. 3;
David E. Chandler, 1039 S. 40th St.;
George Quiroa, Coroner's Office;
Dr. [illegible], University Hospital;
[illegible] G. Crittenden, [illegible];
[illegible] Sue Coates, [illegible] W. Chestnut Street;
Debby [illegible], 1246 S. 2nd Street, 3rd Floor;
James Johnson, 3600 Lynch;
Pat McWhirter, EMS;
Arthur Edwards, 4118 Vermont;
Naida Reid, 1239 S. Brook, 2nd Floor;

OFF: E. Sherrard, 1939; G. Mason, 1514; R. Siclari, 1427; R. Dunn, 0817; T. Clark, 1564; J. Johnson, 0828; D. Ashcraft, 1794; J. Maupin, 0448; S. Owen, 1480; R. Jones, 0308; LPD A. Schl, 0602, ETU; K. Greenwell, ETU

NOV. 2 6 1979
RECEIVED, from the Foreman of the Grand Jury, in their presence, and filed in open Court.
ATTEST: PAULIE MILLER, Clerk
By [signature] D.C.

(1)

INSTRUCTION ON ACCOMPLICE TESTIMONY
TENDERED BY DEFENSE COUNSEL
(TR 260-261; TE 635-639)

2. ACCOMPLICE TESTIMONY

An accomplice is one of two or more persons participating in the commission of a crime, either as a principal actor in its commission or one who is present and is assisting or is encouraging or holding himself in readiness to assist in its commission. If you believe from the evidence that the witness, Norman Crittenden, was an accomplice in the murder mentioned in the indictment, then you cannot convict the defendant, Gregory A. Murphy, on the basis of testimony of said Norman Crittenden unless it is supported by other substantial evidence tending to connect the defendant, Gregory A. Murphy, with the commission of the offense in question, and any other evidence is not sufficient for that purpose if it merely shows that such offense was committed by someone and the circumstances under which it was committed. The court instructs you as a matter of law that Norman Crittenden is an accomplice in the offense charged by virtue of his testimony.

KENTUCKY RULE OF CRIMINAL PROCEDURE (RCr) 9.62
-Repealed September 1, 1980

RULE 9.62 TESTIMONY OF ACCOMPLICE

A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof. In the absence of corroboration as required by law, the court shall instruct the jury to render a verdict of acquittal.

STATES REQUIRING CORROBORATION OF ACCOMPLICE TESTIMONY

Alabama	Ala. Code 1975 §12-21-222 (Bobbs Merrill, 1977)
Arkansas	Ark. Stat. Ann. §43-2116 (Bobbs Merrill, 1977)
California	Cal. Penal Code §1111 (West, 1970)
Georgia	Ga. Code Ann. §38-121 (Harrison, 1981)
Iowa	Iowa Code Ann. §813.2 Rule 20 (West, 1979)
Maryland	Rule established judicially, see Procter v. State, 435 A.2d 484 (Md. App., 1981)
Minnesota	Minn. Stat. Ann. §634-04 (West, 1983)
Montana	Mont. Rev. Code Ann. §46-16-213 (Mont., 1981)
Nevada	Nev. Rev. Stat. §175.291 (Nev., 1979)
New York	N.Y. Crim. Proc. Law §60.22 (McKinney, 1981)
Ohio	Ohio Rev. Code Ann. §2923.03 (Bobbs Merrill, 1973)
Oklahoma	Okla. Stat. Ann. tit. 22 §742 (West, 1969)
Oregon	Or. Rev. Stat. §136.440 (Or., 1981)
Tennessee	Rule established judicially, see Bethany v. State, 565 S.W.2d 900 (Tenn. Crim. App., 1978)
Texas	Tex. Crim. Pro. Code Ann. §38.14 (Vernon, 1979)

STATES HAVING REPEALED CORROBORATION RULE

Arizona	Ariz. Rev. Stat. §13-136 Repealed 1976 Ariz. Sess. Laws Ch. 116 §1
Kentucky	Kentucky Rules of Criminal Procedure (RCr 9.62); Repealed September 1, 1980
Utah	Utah Code Ann. §77-31-18 (1953); Repealed by Utah Code Ann. §77-17-7 (1983); 1980 Utah Laws Ch. 15 §2
Virgin Islands	V.I. Code Ann. titl. 14, §17 (Equity, 1964); Repealed October 25, 1978, 1978 Sess. Law No. 4229

copy of his true and unaltered report, and on February 4, 1977, respondent mailed to the Francis firm a copy of the altered report, representing it to be the true report of Dr. O'Neill. On March 28, 1977, the respondent hand delivered a letter to Mr. Kazee wherein he made mention of Dr. O'Neill's medical report which respondent allegedly had furnished prior thereto to Mr. Kazee. The report actually furnished by respondent to Mr. Kazee was the altered report. The name of Dr. O'Neill appears on the report. However, his name was signed by respondent or his secretary, acting pursuant to respondent's direction. This constituted a forgery and the report was nothing less than a fraud.

Respondent's attempt to justify his actions by asserting that his conduct is customary among attorneys who practice workers' compensation claims falls flat on its face. There is no evidence in the record to warrant such an assertion. However, be it so or not, there is no justification for an attorney to alter medical reports so as to report a nonexisting condition. The legal profession and the courts must recognize the mandate of exchanging truth, not lies or fabrications. The exchange of x-rays or copies of medical reports between counsel must be of unaltered originals or copies. Nothing less will suffice. Anything less than the truth constitutes a fraudulent act of such proportion as to constitute unethical and unprofessional conduct that would bring the bench and bar into disrepute.

Respondent charges that he is damaged by not having a speedy trial. He suggests that he was denied due process as guaranteed by both the United States Constitution and the Kentucky Constitution. A study and an analysis of the record disclose these charges to be without foundation. Respondent's denial that he mailed or caused to be mailed certain designated medical reports is not supported by the testimony. The transcript of testimony shows this denial to be erroneous and, as a matter of fact, absolutely contrary to the testimony.

It is written, "The moving finger writes; and, having writ, moves on: Nor all your piety nor wit shall lure it back to cancel half a line nor all your tears wash out a word of it." (Omar Khayyam). So let it be with Jimmy M. Hammond.

The recommendations of the Board of Governors are accepted. Respondent is permanently disbarred from the practice of law in the Commonwealth of Kentucky, and he is ordered to pay the costs of these proceedings.

All concur except CLAYTON, J., who dissents on the grounds that the punishment is too severe.

COMMONWEALTH of Kentucky, Appellant,

v.

Larry BROWN, a/k/a Larry Downs, Appellee.

Supreme Court of Kentucky.

July 7, 1981.

Rehearing Denied Sept. 1, 1981.

The Commonwealth appealed from order of the Fayette Circuit Court, James E. Keller, J., dismissing murder indictment against defendant. The Supreme Court, Lukowsky, J., held that: (1) attorneys for Commonwealth had no authority to grant immunity from further prosecution to compel testimony of accomplices who refused to testify, and (2) Rule of Criminal Procedure proscribing conviction based on testimony of accomplice unless corroborated by other evidence tending to connect defendant with commission of offense, in effect at time defendant allegedly murdered victim, would apply if Commonwealth proceeded following abolition of such Rule to prosecute defendant and succeeded in introducing testimony of accomplices.

Affirmed.

1. Witnesses ⇐304(1)

Absent statutory or constitutional provisions to the contrary, prosecutor has no inherent power to grant immunity to witness in order to compel his testimony. Const. § 11; U.S.C.A.Const. Amend. 5; KRS 15.020.

2. Criminal Law ⇐42

Government as promisor of immunity from prosecution granted to witness will be required to perform its bargain once witness has relied on promise and performed his part of bargain, so as to preserve integrity of the Commonwealth. Const. § 11; U.S.C.A.Const. Amend. 5.

3. Witnesses ⇐304(1)

There is no common-law authority permitting prosecutors to grant immunity from prosecution to obtain testimony.

4. Criminal Law ⇐510

Rule of Criminal Procedure proscribing conviction based on testimony of accomplice unless corroborated by other evidence tending to connect defendant with commission of offense, in effect at time of offense, would apply if Commonwealth, following abolition of such Rule, proceeded to prosecute defendant and succeeded in introducing testimony of his accomplices, as failure to apply Rule would violate ex post facto prohibitions. Rules of Criminal Procedure, Rule 9.62; Const. § 19; U.S.C.A.Const. Art. 1, § 10, cl. 1.

5. Criminal Law ⇐510

Abolition of Rule of Criminal Procedure proscribing conviction based on testimony of accomplice unless corroborated by other evidence tending to connect defendant with commission of offense enabled Commonwealth to convict on less evidence than previously required. Rules of Criminal Procedure, Rule 9.62.

6. Constitutional Law ⇐202

"Ex post facto laws" include one that alters legal rules of evidence and receives less or different testimony than law required at time of commission of offense in order to convict offender. Const. § 19; U.S.C.A.Const. Art. 1, § 10, cl. 1.

See publication Words and Phrases for other judicial constructions and definitions.

7. Constitutional Law ⇐202

Ex post facto laws are forbidden by State and Federal Constitutions, and it matters not that retroactive reduction in quantum of proof results from exercise of judicial rule-making power rather than from enactment of legislative body. Const. § 19; U.S.C.A.Const. Art. 1, § 10, cl. 1.

8. Criminal Law ⇐706(7)

Commonwealth would not be allowed to call as witnesses accomplices where Commonwealth was aware that accomplices would assert their privilege against self-incrimination. Const. § 11; U.S.C.A.Const. Amend. 5; Rules of Criminal Procedure, Rule 9.62.

9. Criminal Law ⇐417(14)

Effect of prior inconsistent statements once admitted into evidence is not limited to impeaching credibility of witnesses; such statements may be considered as substantive evidence when witness is available and subject to cross-examination.

10. Witnesses ⇐386

Probative effect of prior statement of witness never ripens into issue where witness remains silent at trial, since in such case there is nothing with which prior statement can be inconsistent.

11. Criminal Law ⇐417(14)

Person who justifiably claims privilege against self-incrimination and thereby cannot be forced to testify is unavailable as witness for purpose of invoking rule allowing prior statements to be considered as substantive evidence when witness is available and subject to cross-examination. U.S.C.A.Const. Amend. 5.

12. Criminal Law ⇐662(1)

Since criminal defendant's inability to cross-examine witness regarding extrajudicial statements denies him right of confrontation secured by State and Federal Constitutions, prior statements of person who justifiably claims privilege against self-incrim-

ination and thereby cannot be forced to testify are inadmissible. Const. § 11; U.S. C.A.Const. Amends. 5, 6.

13. Witnesses ⇐309

When accomplices' confessions comprise prosecutor's entire case, inferences from silence of accomplices who justifiably claim privilege against self-incrimination would add critical weight to case in form not subject to cross-examination and thus would unfairly prejudice defendant. Const. § 11; U.S.C.A.Const. Amends. 5, 6; Rules of Criminal Procedure, Rule 9.62.

Steve Beshear, Atty. Gen., James L. Dickinson, Asst. Atty. Gen., Frankfort, for appellant.

Jack Farley, Public Advocate, Mark A. Posnansky, Rodney McDaniel, Asst. Public Advocate, Frankfort, for appellee.

LUKOWSKY, Justice.

This is an appeal by the Commonwealth from an order of the Fayette Circuit Court which dismissed a murder indictment against Larry Brown. The order was entered based upon the Commonwealth's representations that several pre-trial rulings of the court had the effect of preventing the Commonwealth from using all the evidence it had that was reasonably calculated to convict Brown of the offense charged. Consequently, the dismissal was properly granted if the pre-trial rulings were correct.

This case originated in Marion County where Brown, Greg Owens, Steve Edelen and Clarence Furman allegedly burglarized the home of Iva Bugg who was killed during the burglary. Owens and Edelen confessed to the burglary and inculpated Brown as Mrs. Bugg's killer. The Marion County Grand Jury indicted Brown for murder. The Commonwealth's Attorney indicated his intention of seeking the death penalty. Brown successfully sought a change of venue and the case was transferred to the Fayette Circuit Court.

The Commonwealth intended to use Owens, Edelen and Furman as witnesses against Brown. At a pre-trial hearing, Owens and Furman indicated that they would refuse to testify on the grounds of their Fifth Amendment and Ky. Const. Sec. 11 privileges against self-incrimination. Edelen indicated that he would testify "with" Brown.

The Attorney General and the Commonwealth's Attorney proposed to grant immunity from further prosecution to the witnesses who asserted the privilege against self-incrimination and thereby compel their testimony at trial. The witnesses challenged the authority of the prosecutors to grant immunity and relied on their privilege. The Commonwealth then indicated that it would call them as witnesses at trial and, if they successfully asserted their privilege, it would seek to introduce the prior confessions for impeachment and as substantive evidence.

These problems plus the applicability of former RCr 9.62 (corroboration of accomplice testimony) came to the trial court's attention at pre-trial conference. Accordingly the court issued an opinion and pre-trial order in which it ruled (A) the Commonwealth lacked authority to grant immunity from prosecution to witnesses, (B) RCr 9.62, which was in effect at the time the crime was allegedly committed, was applicable, and (C) the confessions would not be admissible under the Jett Doctrine in the event the accomplices refused to testify.

A

[1] The trial court correctly ruled that the attorneys for the Commonwealth had no authority to grant immunity from further prosecution to the witnesses who refused to testify in this case. The Kentucky and United States Constitutions contain no applicable provision and our statutes, albeit extending this authority in limited situations,[1] neither empower a prosecutor gener-

1. See for example KRS 119.345 (election offenses); KRS 199.430(2) (child welfare hearings); KRS 205.170(2) (public assistance hearings); KRS 242.420 (liquor law violations); KRS 276.990(11) (offenses relating to common carriers); KRS 304.2-350 (insurance); KRS

ally nor authorize him under the facts of this case to grant immunity to a witness in order to compel his testimony. The great weight of authority in this country, which we follow today, supports the principle that, absent statutory or constitutional provisions to the contrary, a prosecutor has no such inherent power. *United States v. Ford* ("Whisky Cases"), 99 U.S. 594, 25 L.Ed. 399 (1879); *State v. Roberts*, 4 Conn.Cir. 271, 230 A.2d 239 (1967); *Apodaca v. Viramontes*, 53 N.M. 514, 212 P.2d 425, 13 A.L.R.2d 1427 (1949); *Commonwealth v. Carrera*, 424 Pa. 551, 227 A.2d 627 (1967); *Temple v. Commonwealth*, 75 Va. 892 (1881); 21 Am.Jur.2d, Criminal Law, sec. 150 (1965 and Supp.1980); 81 Am.Jur.2d, Witnesses, secs. 56–57 (1976 and Supp.1980); Annot., Power of Prosecuting Attorney to Extend Immunity from Prosecution to Witness Claiming Privilege Against Self-incrimination, 13 A.L.R.2d 1349–1441; 3 Wharton's Criminal Procedure, sec. 409 (1975 and Supp.1979); 8 Wigmore, Evidence, sec. 2280b (McNaughton rev. 1961).

The Congress of the United States has seen fit to authorize federal prosecutors to grant immunity from further prosecution to witnesses who refuse to testify. 18 U.S.C. secs. 6001–6005. We believe that similar legislative action is required in our Commonwealth to give its prosecutors this authority. Justice Cardozo, while Chief Judge of the New York Court of Appeals, expressed the proposition thus:

> "Whether the good to be attained by procuring the testimony of criminals is greater or less than the evil to be wrought by exempting them forever from prosecution for their crimes is a question of high policy as to which the lawmaking department of the government is entitled to be heard."

Doyle v. Hofstader, 257 N.Y. 244, 177 N.E. 489, 495, 87 A.L.R. 418 (1931).

We are not dissuaded from our opinion by KRS 15.020, which states in part, "The Attorney General is the chief law officer of the Commonwealth of Kentucky and ... shall exercise all common law duties and authority pertaining to the office of the Attorney General under the common law except when modified by statutory enactment."

[2] Our cases have never recognized inherent authority in prosecutors to grant immunity from prosecution to witnesses. *Workman v. Commonwealth*, Ky., 580 S.W.2d 206 (1979) and *Brock v. Sowders*, Ky., 610 S.W.2d 591 (1980) offered no solace to the Commonwealth. Their thrust is that the government as promisor will be required to perform its bargain once the promisee has relied on the promise and performed his part of the bargain. They do not confer power on the government or any representative thereof. They merely preserve the integrity of the Commonwealth.

[3] This Commonwealth was created by the binary fission of Virginia. Sect. 233 of our Constitution provides:

> "All laws which, on the first day of June, one thousand seven hundred and ninety-two, were in force in the State of Virginia, and which are of a general nature and not local to that State, and not repugnant to this Constitution, nor to the laws which have been enacted by the General Assembly of this Commonwealth, shall be in force within this State until they shall be altered or repealed by the General Assembly."

In *Coleman v. Reamer's Ex'r*, 237 Ky. 603, 36 S.W.2d 22, 23 (1931) we pointed out:

> "By an ordinance of the Virginia Legislature passed in 1776, it is declared that the common law of England and all statutory enactments of parliament made in aid of the common law prior to the fourth year of King James 1st, and which were of a general nature and not local to that kingdom, were made a rule of decision and were in full force and effect in Virginia

341.210 (unemployment compensation); KRS 372.100 (champertous contracts concerning land); KRS 432.520 (protection of prisoners); KRS 436.510 (gambling offenses); KRS 437.140 (conspiracy).

until the same were altered by the Legislature." (citations omitted)

Neither the pre-1792 statutory nor decisional law of the Old Dominion countenanced the grant of immunity by prosecutors. 1789 Va. Acts Ch. 30, Sec. 8; *Commonwealth v. Dabney*, 1 Rob. 696, 40 Va. 431 (1842). A similar observation was made about the ancient law of England by the Supreme Court of Appeals of Virginia in *Dabney*, supra at 710, when it quoted the following comment of Sir Matthew Hale with approval:

> " 'more mischief hath come to good men by . . . false accusation by desperate villains, than benefit to the public by discovery and convicting of real offenders.' "

There simply is no common law authority permitting prosecutors to grant immunity from prosecution to obtain testimony.

B

[4, 5] The trial court also properly ruled that RCr 9.62, which was abolished effective Sept. 1, 1980, but was in effect at the time Brown allegedly murdered Mrs. Bugg, would apply if the Commonwealth proceeded to prosecute Brown and succeeded in introducing the testimony of his accomplices. RCr 9.62 proscribed a conviction based on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense. Its abolition enables the Commonwealth to convict on less evidence than previously required.

[6, 7] Clearly, allowing the Commonwealth to proceed with this advantage would violate Sect. 19 of our Constitution and Art. 1, Sect. 10 of the Constitution of the United States, both of which forbid ex post facto laws. The Supreme Court of the United States has specifically listed as an example of these onerous laws one that "alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." *Calder v. Bull*, 3 Dall. 386, 390, 3 U.S. 386, 390, 1 L.Ed. 648 (1798). See *Blondell v. Commonwealth*, Ky., 556 S.W.2d 682 (1977). It matters not that the retroactive reduction in the quantum of proof results from the exercise of the judicial rulemaking power rather than from an enactment of a legislative body. See *Bouie v. City of Columbia*, 378 U.S. 347, 353, 84 S.Ct. 1697, 1702, 12 L.Ed.2d 894 (1964).

We see no reason to reinvent the wheel by writing tediously on this point. We direct the attention of those interested in a more extensive discussion of the problem to part IV of the opinion in *Bowyer v. United States*, D.C.App., 422 A.2d 973, 978 (1980).

C

[8] The trial court properly ruled that the statements of Owens and Furman would be inadmissible if they refused to testify at Brown's trial. Furthermore, the court rightly decided that the Commonwealth not be allowed to call them as witnesses because the Commonwealth was aware that they would assert their privileges against self-incrimination. Potential prejudice and unfairness of constitutional proportions support the soundness of both rulings.

The Commonwealth asserts that, as soon as the accomplices take the stand and refuse to testify, the prosecutor may proceed to impeach their silence by introducing their confessions as prior inconsistent statements under the doctrine established in *Jett v. Commonwealth*, Ky., 436 S.W.2d 788 (1969). The Commonwealth not only misconstrues *Jett*, but fails to grasp the rationale behind its requirements.

[9, 10] *Jett* establishes that the effect of prior inconsistent statements once admitted into evidence, is not limited to impeaching the credibility of witnesses. It allows such statements to be considered as substantive evidence when a witness is available and subject to cross-examination. *Jett*, supra at 792. If a witness remains silent he makes

no statement. Consequently, there is nothing with which the prior statement can be inconsistent. The prior statement is admissible only if it is inconsistent, the probative effect of the prior statement never ripens into an issue.

[11] In *Crawley v. Commonwealth*, Ky., 568 S.W.2d 927 (1978) we held, that for the purpose of determining whether a declarant is unavailable, the definition of unavailability found in Rule 804(a) of the Federal Rules of Evidence is to be applied. That rule reads in part:

> " 'Unavailability as witness' includes situations in which the declarant—(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject of his statement. . . ."

Consequently, a person who justifiably claims a privilege against self-incrimination and thereby cannot be forced to testify is unavailable as a witness for the purpose of invoking *Jett*.

[12] The basis for the requirement of availability for cross-examination is self-evident. A criminal defendant's inability to cross-examine a witness regarding extrajudicial statements denies him the right of confrontation secured by Section 11 of our Constitution and the Sixth Amendment to the federal Constitution. *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). Such statements are consequently inadmissible. *Owsley v. Commonwealth*, Ky., 458 S.W.2d 457 (1970).

[13] To hold otherwise would be patently unfair to the defendant. The witness is effectively not there. The defendant is in an unduly disadvantageous position to counter either the making or the truth of his statements. It is reasonable to infer that the introduction of a statement could easily lead to the jury's believing that the witness made it, and his refusal to testify could result in their improperly inferring that it was true. *Douglas*, supra at 419. When, as is conceded by the Commonwealth in this case, accomplices' confessions comprise the prosecutor's entire case, the "inferences from a witness' refusal to answer [would add] critical weight to [that] case in form not subject to cross-examination and thus [would] unfairly prejudice the defendant." *Namet v. United States*, 373 U.S. 179, 187, 83 S.Ct. 1151, 1155, 10 L.Ed.2d 278, 284 (1963), as quoted with approval in *Douglas*, supra at 420.

This potential for prejudicial error also supports the trial court's ruling that the Commonwealth be prohibited from calling Owens and Furman as witnesses in Brown's trial. A growing number of jurisdictions have found prejudice when a prosecutor calls as a witness a person who is implicated in the defendant's alleged crime for the purpose of extracting from him a claim of privilege against self-incrimination. See Annot., Prejudicial Effect of Prosecution's Calling as Witness, to Extract Claim of Self-incrimination, One Involved in Offense with which Accused is Charged, 86 A.L.R.2d 1443–1459.

In *Higgs v. Commonwealth*, Ky., 554 S.W.2d 74 (1977) we reversed the defendant's conviction of larceny because the Commonwealth called as a witness a co-indictee when aware she would invoke her Fifth Amendment privilege and asked her a question which she then declined to answer. There we reasoned:

> "With the jury's tendency to accept as true a statement unanswered by a witness who invokes the Fifth Amendment privilege, together with the defendant's inability to cross-examine the witness, defendant is unduly prejudiced . . . . And the error was compounded by the prosecutor's awareness that the [witness] would invoke the privilege."

Id. at 75.

The order of the Fayette Circuit Court is affirmed.

All concur.

IN THE

SUPREME COURT OF THE UNITED STATES

NO._____, Misc., October Term, 1983

GREGORY ARNOLD MURPHY, Petitioner	)
V.	)
COMMONWEALTH OF KENTUCKY, Respondent	)

83-5352

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes the petitioner, Gregory Arnold Murphy, by counsel, and respectfully requests leave to file the accompanying Petition for a Writ of Certiorari to the Supreme Court of Kentucky without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The petitioner states that he has proceeded as a pauper without the payment of fees or costs throughout the proceedings in the state appellate court below, that the petitioner has been found by the Kentucky state courts to qualify as an indigent and to have counsel appointed to represent him on direct appeal to the Kentucky Supreme Court, that counsel from the Office of the Jefferson District Public Defender was appointed by the Jefferson Circuit Court to represent the petitioner on appeal and the petitioner is, therefore, entitled to proceed herein without payment of fees, costs or giving of security therefor. An affidavit of indigency is attached hereto.

CERTIFICATE

I do hereby certify that a copy of this motion was served by depositing the same in an United States mailbox, with first class postage prepaid, to Hon. Eileen Walsh, Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601, on September 2, 1983.

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DANIEL T. GOYETTE
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OF COUNSEL

IN THE

SUPREME COURT OF THE UNITED STATES

NO._____, October Term, 1983

GREGORY ARNOLD MURPHY,

Petitioner

V. AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMMONWEALTH OF KENTUCKY,

Respondent

*** ***

I, Gregory Arnold Murphy, being first duly sworn, depose and say that I am the petitioner in the above-styled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe that I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the appeal are true.

1. Are you presently employed? No.

   a. If yes, state the amount of your salary or wages per month and name and address of your employer.

   b. If no, state the date of your last employment and the amount of the salary and wages per month which you received. April 1979. $950.00 per month.

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment or in the form of rent payments, interest, dividends, or other source? No.

a. If yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? No.

a. If yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Real estate located at 2725 Magazine Avenue, Louisville, KY 40211. 1972 Buick.

a. If yes, describe the property and state its approximate value. Two bedroom home. $12,500.00. Automobile valued at $600.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons. Wife and three (3) children.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Gregory Arnold Murphy
GREGORY ARNOLD MURPHY, AFFIANT

COMMONWEALTH OF KENTUCKY
COUNTY OF OLDHAM

SUBSCRIBED AND SWORN to before me by Gregory Arnold Murphy, on August 8, 1983. My Commission expires: My Commission Expires June 30, 1986

Martha Hellard Lattimore
NOTARY PUBLIC, State at Large, KY.